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No. 36977-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RICHARD AND ANNETTE BOWIE, d/b/a VALPAK OF WESTERN WASHINGTON - NORTH, *et al.*,

Appellants,

v.

WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

APPELLANTS' BRIEF ON APPEAL

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ASSIGNMENT OF ERRORS

1. The trial Court erred in holding that Valpak is not a periodical when, as the Court recognized, it is within the plain meaning of the statutory definition of periodical in RCW 82.04.280.

2. The trial Court erred in holding that the Taxpayers are not taxable under RCW 82.04.280 on the theory that they are "not the publisher" of the Valpak circulars they create and distribute.

ISSUE PRESENTED

Whether the Taxpayers are "engaged in the business of publishing ... periodicals" under the plain language of RCW 82.04.280.

STATEMENT OF THE CASE

A. Taxpayers' business.

Appellants, Richard and Annette Bowie d/b/a Valpak of Western Washington North, *et al.* (collectively "Taxpayers") are local, independent businesses that create and distribute printed circulars ("Valpak") in franchised territories covering western Washington. CP 27-28. The Taxpayers issue Valpak to more than 1.5 million households monthly. CP 28-29. Each of the Taxpayers is a franchisee of Valpak Direct Marketing Systems, Inc. ("VPDMS"), a Delaware corporation with its principal place of business in Largo, Florida. CP 27, 227, 531.

Each edition of Valpak is a compilation of advertisements, printed one per page, arranged in an order determined by the Taxpayers, and enclosed in a distinctive blue envelope bearing the Valpak logo. CP 28. Each Taxpayer creates "zones" of 10,000 residential addresses within their franchised territory. *Id.*. The content of a Valpak issue mailed within a given zone is identical. There are variations in content between zones depending on the geographic area targeted by each advertiser. CP 29.

The Taxpayers create the content and layout of the Valpak publications they issue. The Taxpayers: (1) establish advertising standards for their publications; (2) obtain orders from local advertisers; (3) work with the advertisers to design the advertisements; (4) edit the proofs; (5) approve or disapprove non-local advertisements, (6) organize the pages in the sequence they desire; (7) hire VPDMS to print, collate, stuff, and address Valpak circulars pursuant to Taxpayers' orders and instructions; (8) decide whether to include a local promotion on the cover and, if so, what local promotion; (9) compile the specific addresses creating each zone in their territory; (10) set the publication schedule (Taxpayers have collectively established a single publication schedule throughout Washington, which is set 18 to 24 months in advance) – since 1993 Taxpayers have issued Valpak monthly in western Washington; and (11)

work directly with the U.S. Postal Service to effectuate the scheduled in-home delivery dates. CP 28-29, 527, 532-33.

Each Taxpayer has the exclusive right to create Valpak and place orders for the printing and mailing of Valpak circulars issued by that Taxpayer in its franchised territory. CP 29, 229-30, 533.

B. Procedural History

In 2002, the Department issued a letter ruling holding that "Valpak of Western Washington" is properly taxable under RCW 82.04.280(1), the B&O tax classification applicable to persons engaged the business of "publishing ... periodicals," *inter alia.* CP 39-42; WAC 458-20-143. Prior to the letter ruling, the Taxpayers had been paying B&O tax under RCW 82.04.290(2), the catchall "service and other" classification, applicable to businesses that are not taxed under one of over 40 specific B&O classifications established in Chapter 82.04 RCW.

In response to the Department's ruling, the Taxpayers (each of whom does business under a form of the name Valpak of Western Washington) filed refund claims with the Department and began reporting their B&O taxes under the classification for publishing periodicals. CP 75. After issuing refunds to two Valpak businesses, the Department rescinded the letter ruling and placed the refund claims of the Taxpayers on hold. CP 44, 76, 77.

The Department subsequently admitted that its reason for rescinding the letter ruling was improper. The Department had mistakenly taken the position that Valpak does not qualify as a periodical because its content consists "entirely of advertising." CP 78. The Department now "agrees with plaintiffs that the definition of 'magazine or periodical' ***does not include content requirements***." CP 547 (emphasis added). Despite admitting its error, the Department has persisted in arguing that Valpak is not a periodical. During administrative proceedings (including two hearings) over the course of more than three years, the Department has created an ever-changing array of arguments to rationalize its original, pre-determined end result. *See e.g.* CP 14-16, 77-84.

After the Department issued a final determination affirming the rescission of its letter ruling and denying the refund claims (CP 275), the Taxpayers commenced this lawsuit under RCW 82.32.180. CP 5.

On cross-motions for summary judgment, the Court held that Valpak is not a periodical, speculating that the Legislature may not have intended advertising publications to be covered by the definition. RP 43.[1] However, when asked by the Department to clarify which part of the

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[1] Yet the Court also expressed confusion over the Department's concession that other advertising publications qualify as periodicals. RP 44 ("I am very bothered about what's the distinction then between this envelope full of coupons and the Boat Trader for instance or some other bound equivalent ... I don't know what the distinction is between how the Department is treating direct mail advertising that comes in coupons and direct mail advertising that comes in a binding of some sort.").

statutory definition Valpak does not satisfy, the judge refused to base his ruling on the statutory definition, explaining:

> I'm not going to fall into the same ambush I think you fell into of meeting Mr. Edwards on his own ground, because if you go there he might win.

RP 47, lines 19-22. Almost as an afterthought, the Court added that its ruling was also based on the notion that the Taxpayers "are not the publisher" of the Valpak circulars they create and distribute because the franchise agreement applies a "publisher" title to VPDMS. RP 45. The Court did not discuss either the nature of the Taxpayers' business or what activities comprise the "business of publishing" under RCW 82.04.280, again avoiding the language of the controlling statute.

SUMMARY OF ARGUMENT

Valpak is a periodical under the plain language of the statutory definition in RCW 82.04.280. Because the Taxpayers, by creating and distributing Valpak, are engaged in the business of publishing periodicals, they are properly taxable under RCW 82.04.280(1). Even if the statute were ambiguous (which it is not) any ambiguity in such tax imposition statutes is required to be resolved against the Department and in favor of the Taxpayers.

ARGUMENT

A. Valpak is a periodical as defined in RCW 82.04.280.

RCW 82.04.280(1) establishes the tax rate applicable to persons "engaged in the business of publishing newspapers, periodicals or magazines." RCW 82.04.280 defines periodical:

> As used in this section, "periodical or magazine" means a printed publication, other than a newspaper, issued regularly at stated intervals at least once every three months, including any supplement or special edition of the publication.

The requirements for periodicals are unambiguously specified in the statute's plain language. Applying that plain language in its letter ruling, the Department noted "the Valpak publication is a printed publication. It is not a newspaper. It is issued at least once every three months (actually issued once each month)." CP 40. Thus, the Department concluded "the publication meets the definition of periodical under RCW 82.04.280." CP 42. The lower Court likewise expressly recognized that Valpak is within the plain language of the statutory definition: "The legislature has said in words, and the words that they used would allow this to fall within what counts as a periodical." RP 46, lines 17-19.

Rather than applying the acknowledged plain language of the statute to Valpak, the lower Court speculated that the Legislature did not mean what it said. RP 46 ("the legislature passed legislation that does

more than they intended it to"). The lower Court's decision was contrary to the Supreme Court's instruction that "when the statutory terms are plain and unambiguous we assume the legislature meant exactly what it said." *Burton v. Lehman*, 153 Wn.2d 416, 424, 103 P.3d 1230 (2005).

The Court's "duty in interpreting a statute is to ascertain and give effect to the intent and purpose of the legislature ***as expressed in the act***." *State v. Rhodes*, 58 Wn. App. 913, 919, 795 P.2d 724 (1990) (emphasis added). Thus, an unambiguous statute is applied according to its plain language. "If the statute's meaning is plain on its face, then courts must give effect to its plain meaning as an expression of what the Legislature intended." *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

In violation of these precepts, the lower Court declined to apply the plain language of the Legislature's definition, based on the Court's speculation that the result might not be consistent with what the "common average person ... would understand as a periodical." RP 43. In so ruling, the lower Court's decision also violates the well settled principal that a statute's "definition of a term prevails over a ... common understanding of a term." *Amalgamated Transit Union 587 v. State*, 142 Wn.2d 183, 220, 11 P.3d 762 (2000). As the Supreme Court has repeatedly noted "It is an axiom of statutory interpretation that where a term is defined we will use that definition." *U.S. v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 1005

(2005), *citing Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 813, 828 P.2d 555 (1992).

Nevertheless, the lower Court identified two additional, unwritten requirements for a "periodical": (1) that "periodical" excludes advertising publications, and (2) that a "periodical" requires some type of "binding on it and a cover page." RP 43-44. Even if it were appropriate to look beyond the plain language of the Legislature's definition (which it is not), neither unwritten requirement can be judicially grafted onto the statute.

First, Courts do not "add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *Lone Star Indus., Inc. v. Dep't of Revenue*, 97 Wn.2d 630, 634-35, 647 P.2d 1013 (1982) (invalidating Department of Revenue rule that added a requirement not established by the plain language of the statute).

Second, as the Department has expressly admitted, the Legislature's definition is intentionally content-neutral:

> Due to court decisions which restrict a state's ability to base taxing decisions upon a publication's content ... in 1994 the legislature enacted Ch. 12, Laws of 1994 to provide content-neutral definitions for "newspaper" (RCW 82.04.214) and "magazine and periodical" (RCW 82.04.280).

CP 123. And in a Special Notice issued June 8, 1994, the Department advised taxpayers: "Any publication meeting this definition qualifies regardless of its content," noting that advertising publications that the Department had previously denied the publishing periodicals classification "are now subject to the lower printing and publishing rate." CP 129. There is absolutely nothing in the record to support the lower Court's speculation that the Legislature may have harbored an unexpressed intention to exclude advertising publications from the statutory definition of periodical.

Third, the common meaning of the word periodical as reflected by its dictionary definition does not include either a content requirement or a binding/cover page requirement. Throughout the administrative proceedings, the parties cited definitions of periodical from four different dictionaries: Webster's Third New International Dictionary (2002);[2] The American Heritage College Dictionary (3d Ed. 1997); The New World Dictionary (Second College Edition 1970); and Ballantine's Law Dictionary (1969). ***Not a single one of them*** makes any reference to either a content or binding requirement in defining periodical. Rather, the focus of all four dictionaries is on regular, periodic issuance, with the only

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[2] The Department conceded that the statutory definition "is not significantly different than that in Webster's Third New International Dictionary." CP 453 (at n. 10).

differences being in how each describes the frequency of that periodic issuance.

Fourth, if the Legislature had intended to impose a binding or other format requirement it would have done so expressly, just as it did in the definition of "newspaper" adopted in the very same enactment. *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005) ("If the legislature had intended to include a finished product requirement in RCW 82.04.260(4), it would have done so in the same manner" as it did in RCW 82.04.260(1)(a) and (b)). In *Agrilink*, the Supreme Court reversed a decision denying a tax classification for processing perishable meat products because the Court of Appeals "did not undertake an appropriate plain language analysis but, rather, added a requirement ... that the statutory text does not dictate." *Id.* at 398.

Because, as the trial Court acknowledged, Valpak is within the Legislature's definition of periodical for tax purposes, it was error to deny the Taxpayers' summary judgment motion on the basis of the trial Court's perception what a periodical should be.

B. Taxpayers are engaged in the business of publishing Valpak.

While the trial Court's analysis was focused on whether Valpak is a periodical, the Court also justified its ruling on VPDMS assigning itself the title of "publisher" in the franchise agreement. RP 43 ("Of course they're not the publisher. They agree to that in their agreement with" VPDMS).

First, the Court's decision, which failed to address the activities conducted by the Taxpayers, was not based on the controlling statutory language. B&O tax is imposed on the "act or privilege of engaging in business activities." RCW 82.04.220. Thus, as the Supreme Court has repeatedly emphasized the "*subject* of the tax" is the "activity itself." *Agrilink*, 153 Wn.2d at 398, *citing Fibreboard Paper Prods. Corp. v. State*, 66 Wn.2d 87, 90, 401 P.2d 623 (1965) (emphasis in original).

Second, because B&O tax is imposed on taxpayers' activities, the Supreme Court has held that "contractual labels are not determinative" of B&O tax consequences. *Rho Co., Inc. v. Dep't of Revenue*, 113 Wn.2d 561, 570, 782 P.2d 986 (1989). Thus, the Department refuses to be bound by the language of the parties' contracts in determining tax consequences, such as when wholesaling or retailing B&O tax may be due on interstate sales of goods. *E.g.* Det. No. 99-216E, 18 WTD 264 at 272-73 (1999). The assignment of the title "publisher" is not relevant to determining

whether the activities conducted by the Taxpayers are part of the "business of publishing" taxed under RCW 82.04.280(1). Surely, the proper B&O tax classification of the Taxpayers' business activities would not change if the franchise agreement were amended to assign the title of "publisher" to the franchisees.

Third, undefined words in a statute are accorded their ordinary meaning. *Cowiche Canyon Conservancy*, 118 Wn.2d at 813. The ordinary meaning of "publishing" is disseminating information to the public by creating and issuing printed materials:

> Publishing is the process of production and dissemination of literature or information – the ***activity of putting information into the public arena***. ... Publishing ***includes the stages*** of the development, acquisition, copyediting, graphic design, production – printing (and its electronic equivalents), and marketing and distribution

http://en.wikipedia.org/wiki/publishing; http://wordnet.princeton.edu ("publishing: the business of issuing printed matter for ... distribution");[3] and D. Brownstone and I. Franck, *The Dictionary of Publishing*, (Van Nostrand Reinhold Company 1982) ("publishing: 1. As a process, the securing, physical preparation, manufacture, and distribution of publications and ***all related functions***.") (emphasis added). As discussed at pp. 2-3, the Taxpayers' business is to disseminate information to the

[3] Both websites were visited on August 17, 2007, and again on March 3, 2008.

public by preparing and issuing printed materials. Taxpayers are engaged in the business of publishing under the plain meaning of the term.

Fourth, as reflected in the common understanding of the term "publishing," the wide range of activities that constitute publishing consist of much more than holding the title of "publisher." For example, The Seattle Times Company is engaged in the business of publishing The Seattle Times while Frank Blethen is the "publisher" of that publication. Applying the principles discussed above, Washington Courts have consistently recognized that the state's B&O tax classifications cover broad arrays of business activity.

Most recently in *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 38, 156 P.3d 185 (2007) *cert. denied* __ U.S. __ (Feb. 19, 2008) the Supreme Court held that the B&O tax classification applicable to "the business of making sales" encompasses virtually any selling related activity, including *inter alia*, "advertising, sending representatives to meet with [customers], imparting information about new products, discussing problems and customer satisfaction concerns, and marketing." The Court emphasized that "the business of making sales" encompasses "not merely 'making sales'" but any business activity "related to" the business of selling. In *Ford*, the Court expressly rejected the argument that activities other than the actual making of sales should be taxed under the "service

and other" B&O tax classification. *Id.* at 42-43. Similarly, RCW 82.04.280(1) applies to "***the business of*** ... publishing ... periodicals." It is not limited to persons who bear the title "publisher" but is imposed on all persons engaged in business activities that are part of the business of publishing.

Fifth, in contrast to the Taxpayers' publishing activities – by which they (among other things) develop the content of their publications, determine the layout of their publications, establish the distribution schedule for their and select who will receive their publications – the activities performed by VPDMS would be subject to tax under the retailing B&O classification as "mailing bureau services." WAC 458-20-141(3) ("Activities conducted by mailing bureaus include, but are not limited to, ... addressing, labeling, binding, folding, enclosing, sealing, tabbing, and mailing the mail pieces.").[4]

Sixth, the "specific prevails over the general." *Medical Consultants Northwest, Inc. v. Dep't of Revenue*, 89 Wn. App. 39, 49, 947 P.2d 784 (1997). RCW 82.04.280(1) provides a specific tax classification, while the classification urged by the Department is a general, catchall

[4] Because Washington's B&O tax is only imposed on business activities conducted "within this State" (RCW 82.04.200) and VPDMS performs its mailing bureau services in Florida, the B&O tax classification of VPDMS's activities is not at issue in this case. Nevertheless it is worth emphasizing that the Taxpayers are properly taxable under the publishing periodicals B&O tax classification regardless of which classification VPDMS would be taxable under if it were engaged in business in Washington.

classification reserved only for activities "other than" those "enumerated in ... RCW 82.04.280" and the nearly 40 other specific B&O tax classifications in RCW Chapter 82.04. RCW 82.04.290(2).

Finally, any ambiguity regarding proper classification of the Taxpayers' activities must be resolved in favor of the Taxpayers and against the Department. It is well settled that ambiguous taxing statutes are to be "construed most strongly against the taxing power and in favor of the taxpayer." *Agrilink*, 153 Wn.2d at 396-397 As noted above (at p. 10), the issue in *Agrilink* was which of two B&O tax classifications applied to the taxpayer's business. The Court specifically stated that any ambiguity regarding the proper classification would have to be resolved "in favor of the taxpayer. *Id.* at 399, n.1.[5]

CONCLUSION

For the reasons discussed above, Valpak Envelopes are periodicals under the plain language of the statutory definition in RCW 82.04.280. By creating and distributing Valpak, the Taxpayers are engaged in the business of publishing periodicals and are properly taxable under RCW 82.04.280(1). Taxpayers respectfully request the Court of Appeals to

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[5] The Supreme Court has very recently reaffirmed this important principal of tax law. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 364, 166 P.3d 667 (2007) ("Ambiguities in taxing statutes are construed 'most strongly against the government and in favor of the taxpayer,'" *quoting Estate of Hemphill v. Dep't of Revenue*, 153 Wn.2d 544, 552, 105 P.3d 391 (2005) (*quoting Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973)).

reverse the dismissal of their Complaint with instructions to enter summary judgment in their favor.

DATED: March 5, 2008

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served this day by hand delivery, at the following addresses:

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